

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Alert Cable TV of North Carolina, Inc.,	)	
d/b/a Time Warner Cable	)	CSR 5939-E
	)	
Petition for Determination of Effective	)	
Competition in the Town of Cary, North Carolina	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 27, 2003**

**Released: July 7, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Alert Cable TV of North Carolina, Inc., d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition alleging that Time Warner is subject to effective competition from competing service providers in its Cary, North Carolina franchise area. Time Warner alleges that its cable system is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules.<sup>2</sup> Time Warner bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and DISH Network (“DISH”). The Town of Cary filed an opposition to which Time Warner replied. In addition, Time Warner filed a supplement to its petition in response to a Media Bureau request for a clarification regarding information contained in the initial petition.<sup>3</sup>

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 76.905 of the Commission's rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Time Warner has met this burden.

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<sup>1</sup> 47 U.S.C. § 543.

<sup>2</sup> 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(2).

<sup>3</sup> On January 30, 2003, counsel for Time Warner was informed by letter that their petition was dismissed for failure to comply with the Bureau's information request. Further investigation revealed that Time Warner did make a filing, but it was submitted under the wrong case number. Accordingly, the January 3, 2003 dismissal of Time Warner's petition is set aside.

<sup>4</sup> 47 C.F.R. § 76.905.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.<sup>5</sup>

4. Turning to the first prong of the competing provider test, we find that the programming of DBS providers, such as DirecTV and DISH, satisfy the Commission's programming comparability criterion. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>6</sup> Time Warner has provided evidence of the advertising of DBS service in the local media serving its Cary franchise area.<sup>7</sup> With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.<sup>8</sup> We find that Time Warner has demonstrated that Cary is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Time Warner also demonstrated on this record that the two DBS providers are physically able to offer MVPD service to subscribers in Cary, that there exists no regulatory, technical, or other impediments to households within Cary taking the services of the DBS providers, and that potential subscribers in Cary have been made reasonably aware of the MVPD services of DirecTV and DISH.<sup>9</sup> Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner sought to determine the competing provider penetration by purchasing a franchise-specific zip code report from SkyTrends that identified the DBS subscribers in the Time Warner franchise area.<sup>10</sup> Time Warner recognized that some of the DBS subscribers identified in the report may actually live in zip codes outside of Cary.<sup>11</sup> To account for such a possibility, Time Warner devised a formula that compares U.S. Census household data for Cary and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.<sup>12</sup> Cary filed an opposition questioning Time Warner's assumptions as to the zip codes that contain households in the franchise area. Cary submitted its own assessment of the zip codes that Time Warner should have used in its calculations.<sup>13</sup> Because of the conflicting evidence in the record, the Bureau could not evaluate the accuracy of the Petition's calculation. Upon the request of the Bureau, Time Warner submitted a stipulation it had reached with

<sup>5</sup> 47 U.S.C. §543(1)(1)(B); *see also* 47 C.F.R. §76.905(b)(2).

<sup>6</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>7</sup> Time Warner Petition at 4 and Exhibit A.

<sup>8</sup> *See* 47 C.F.R. § 76.905(g); *see also* Time Warner Petition at 5 and Exhibits B and C.

<sup>9</sup> Time Warner Petition at 4 - 5 and Exhibit A.

<sup>10</sup> *Id.* at 7 and Exhibit H.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 7 and Exhibit F.

<sup>13</sup> Cary Opposition at 3.

Cary as to the zip codes that encompass the franchise area.<sup>14</sup> Using the agreed upon zip codes, Time Warner submitted a new calculation of the number of DBS subscribers. Time Warner also reduced the estimated DBS subscriber count by 15 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.<sup>15</sup> Time Warner calculated the DBS penetration rate in Cary to be 17.25 percent.<sup>16</sup>

6. Time Warner asserts that it is the largest MVPD in Cary because Time Warner's subscribership exceeds the aggregate DBS subscribership for the franchise area.<sup>17</sup> Based upon the 17.25 percent aggregate DBS subscriber penetration level, calculated using 2000 Census household data,<sup>18</sup> we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in Cary. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Cary is subject to effective competition.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Alert Cable TV of North Carolina, Inc., d/b/a Time Warner Cable **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification of Cary, North Carolina to regulate basic cable service rates **IS HEREBY REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>19</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Deputy Chief, Policy Division, Media Bureau

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<sup>14</sup> Letter from Steven Broecker, Deputy Chief, Policy Division, Media Bureau, to Arthur Harding, Fleischman and Walsh (Nov. 14, 2002).

<sup>15</sup> Time Warner Petition at 8. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

<sup>16</sup> Supplement at 3, n.7 and Exhibit C.

<sup>17</sup> Petition at 6 and Exhibit E.

<sup>18</sup> Supplement at Exhibit C (6,022 DBS subscribers ÷ 34,906 Cary 2000 Census Households = 17.25%).

<sup>19</sup> 47 C.F.R. § 0.283.